BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACK L. WATERMAN, II Claimant	)	
VS.	)	
BONES TRANSPORTATION Respondent	)	Docket Nos. 1,054,549 & 1,054,550
AND	)	
KANSAS TRUCKERS RISK MANAGEMENT GROUP Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the September 27, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Stacey Blakeman of Lawrence, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 26, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

On February 15, 2011, claimant filed an Application for Hearing in Docket No. 1,054,549, alleging he injured his back, left arm, left elbow, left hand, left thumb and left ring finger when he slipped and fell inside a semitrailer on November 14, 2010. In Docket No. 1,054,550, claimant also filed an Application for Hearing on February 15, 2011, alleging a series of repetitive injuries beginning on December 1, 2010, to his back, groin, buttocks, right leg and right foot caused by driving with a broken suspension.

Claimant requested medical treatment for the back injury and temporary total disability (TTD) benefits from February 15, 2011, through April 25, 2011. Respondent apparently admitted that claimant suffered a left arm injury and agreed to pay TTD benefits from April 26, 2011, through August 31, 2011. Respondent denied that claimant suffered a back injury that arose out of and in the course of his employment with respondent and opposed claimant's request for TTD benefits from February 15, 2011, through April 25, 2011, and claimant's request for medical treatment for his back.

The ALJ found that claimant suffered only a left arm injury and awarded claimant TTD benefits from February 15, 2011, through August 31, 2011, less amounts of TTD benefits already paid for that period. The ALJ found that claimant failed to prove he injured his back in the course of his employment through either a single traumatic injury or a series of repetitive traumas. Accordingly, the ALJ denied claimant's request for medical treatment for a back injury. Claimant appealed and raised the issues of whether claimant's back injury arose out of and in the course of his employment with respondent, whether claimant gave respondent timely notice of the accident and whether claimant made a timely written claim.

The issues before the Board on this appeal are:

1. Did claimant suffer a back injury by accident arising out of and in the course of his employment with respondent? In Docket No. 1,054,549 claimant alleges he injured his back in a single traumatic accident on November 14, 2010. Claimant alleged a back injury in Docket No. 1,054,550 as a result of a series of repetitive traumas. Respondent asserts, in both claims, that claimant did not meet the burden of proof that he suffered a back injury arising out of and in the course of his employment.

2. If claimant suffered a back injury by accident arising out of and in the course of his employment with respondent, did claimant give respondent timely notice of the accident and make a timely written claim?

FINDINGS OF FACT

Prior to working for respondent, claimant had significant back problems. In 2005, claimant suffered a significant work-related back injury that resulted in an award of work disability benefits. Claimant was treated for that injury by Dr. Robert Eyster. He gave claimant permanent work restrictions of not lifting more than 20 pounds, no repetitive lifting more than 15 pounds, no excessive forward bending or twisting at the hips and not to sit for more than 2½ hours at a time. Claimant eventually settled the claim for $65,000.00.[1]

[1] This information was elicited from claimant through testimony. No records concerning claimant's 2005 accident and subsequent medical treatment and workers compensation claim were placed into evidence.

Claimant began working for respondent as a truck driver in September 2009. On November 14, 2010, claimant delivered a load of feed which was frozen in the bucket of the truck. While trying to unload frozen feed with a shovel, claimant fell, landing on his buttocks and left arm. He testified that approximately one-half hour after falling, he called his dispatcher, Mark Washburn, and reported the injury. Claimant alleges he told Mr. Washburn he had hurt his arm and hand, his back was killing him, and he could not bend over to do any more shoveling, and he sent pictures of his left hand.[2] However, upon cross-examination, claimant acknowledged he did not tell Mr. Washburn of the back injury.[3] He also testified that immediately after the fall, his back hurt, but not to the degree his left elbow was hurting.

After the fall, claimant continued to perform his normal work duties for respondent. He testified that he would work out in a gym or in or near his truck 2 to 3 times a week when he was on the road. He would jog, do pushups, sit-ups, triceps, biceps, deep knee bending and pushes.[4] He continued having problems with his left hand and arm, and asked Stephen Stittsworth, respondent's safety director, to see a physician. Mr. Stittsworth authorized claimant to see Dr. Jon P. Kirkpatrick at Via Christi. Claimant saw Dr. Kirkpatrick on December 22, 2010. Dr. Kirkpatrick x-rayed claimant's left hand and elbow, but did not see any evidence of an injury. He released claimant with no restrictions. His report does not indicate claimant made complaints of a back injury.

Claimant was discharged by respondent on February 14, 2011. Claimant testified that between November 14, 2010, and February 14, 2011, he spoke to Mr. Stittsworth and Paul Bones, president of respondent. Claimant acknowledged that he only told Mr. Stittsworth and Mr. Bones of the left hand and arm injuries. As a result of the fall on November 14, 2010, claimant filed his Application for Hearing in Docket No. 1,054,549.

In Docket No. 1,054,550, claimant alleges he injured his back as a result of a series of repetitive traumas. Claimant asserts air bags in the back of the cab and under the driver's seat leaked. This apparently caused him to bounce up and down while driving the truck.[5] Claimant alleges the bouncing up and down in the truck while he drove and getting in and out of the truck caused injury to his back.

Claimant, on his own, sought medical treatment for unintentional fecal soiling on January 28, 2011, at the emergency department of the Dickinson County Healthcare System in Kingsford, Michigan. There he was seen by Dr. Dennis C. Whitehead. Claimant

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[2] P.H. Trans. at 10, 37.

[3] *Id.*, at 29-30.

[4] *Id.*, at 39.

[5] *Id.*, at 12.

testified that he tried to contact Dr. John C. Gollier, his family physician in Ottawa, Kansas, but could only reach Dr. Gollier's nurse. According to claimant, the nurse recommended that he seek immediate medical treatment. Claimant testified he also tried to contact Mark Washburn and Paul Bones before seeing Dr. Whitehead. Dr. Whitehead's report indicates claimant had a history of back problems, and for the past few days had unintentional fecal soiling and pain with weakness in the right lower extremity. The report indicates claimant did not complain of a specific injury. However, claimant felt some straining sensation when getting into his rig recently. Dr. Whitehead's report indicates that he told claimant to have an MRI, as claimant likely had a herniated disc. Claimant had Dr. Whitehead fax his report to respondent.

When claimant returned to Kansas, he was authorized by respondent to see Dr. Gollier. On February 15, 2011, claimant saw Dr. Gollier, who diagnosed claimant with ulnar neuritis and back pain with radiculopathy. He recommended that claimant undergo an EMG of the left elbow and an MRI of the low back. He also proposed that claimant see specialists for the left elbow and back. Dr. Gollier contacted Mr. Stittsworth to authorize the MRI, but authorization was denied. Claimant acknowledged that he told Dr. Gollier the back injury was a result of the fall on November 14, 2010.[6] Dr. Gollier also wrote an "Excuse for Absenteeism" dated February 15, 2011, indicating claimant was unable to work.[7] The Excuse for Absenteeism does not state what injury prevented claimant from working.

Respondent authorized claimant to see Dr. E. Jerome Hanson, certified as a Diplomate by the American Board of Neurological Surgery. He examined claimant on March 29, 2011. Dr. Hanson reviewed the reports of Drs. Kirkpatrick and Gollier, but not the report of Dr. Whitehead. Nor did Dr. Hanson review any prior diagnostic tests or order any diagnostic tests. The report of Dr. Hanson does not mention claimant's 2005 accident and resulting low back injury.

Dr. Hanson's report indicates claimant was complaining of "spasm" of the left forearm with paresthesias extending into the fourth and fifth fingers. Claimant also complained of pain in the right buttock on an intermittent basis that would extend into the right lateral or medial thigh down to the sole of the right foot. Claimant reported normal bladder and bowel control. Dr. Hanson stated that as a result of the November 14, 2010, fall, claimant had traumatic left ulnar neuritis with minimal neuropathic changes. He also noted that claimant may have a mild lumbar strain. Claimant told Dr. Hanson his back problems were caused by the fall and subsequent malfunctioning of the air cushioning in claimant's truck. Dr. Hanson indicated it would be difficult or impossible to attribute claimant's back problems to his work activities.

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[6] *Id.*, at 37.

[7] *Id.*, Cl. Ex. 2.

Dr. Hanson called into question claimant's credibility regarding the low back and right leg complaints because his subjective complaints were not corroborated by objective findings. He gave restrictions for the left elbow, but indicated that claimant could continue performing his normal duties. Although he did not recommend any clinical studies or diagnostic tests for claimant's low back, he indicated no further treatment was necessary unless credible objective clinical findings develop.[8]

Claimant was authorized by respondent to see Dr. George L. Lucas, an orthopedic surgeon. Claimant was examined by Dr. Lucas on April 25 or 26, 2011. The report from that appointment indicates that claimant attributed his low back injury to a fall at work on November 14, 2010. Claimant indicated that another physician was "looking over his back situation."[9] Radiographs of the left elbow, left wrist and cervical spine were conducted. The radiographs of the left wrist and elbow were within normal limits. The radiographs of the cervical spine revealed modest degenerative changes. Dr. Lucas diagnosed claimant with an ulnar nerve contusion and recommended an electrodiagnostic study to document any damage to the ulnar nerve. He indicated claimant could not return to work. An electrodiagnostic study conducted on May 4, 2011, revealed left ulnar neuropathy at the elbow with demyelinating features. There was no evidence of left median neuropathy or cervical radiculopathy.

On May 11, 2011, Dr. Lucas indicated that claimant could return to work, but restricted him to light duty, with no twisting, lifting no more than 10 pounds and no use of vibrating tools. He also prescribed physical therapy for claimant's left elbow and hand. Dr. Lucas saw claimant again on June 1, 2011. Dr. Lucas was told by claimant that he saw a physician in Michigan who made some recommendations regarding his back and also saw a doctor in Kansas City who said nothing was wrong with his back. In a note memorializing the June 1, 2011, visit, Dr. Lucas stated: "I do fairly strongly recommend that he [claimant] see an orthopedist here in Wichita who treats low back problems."[10] On August 31, 2011, Dr. Lucas released claimant without restrictions.

At the request of his attorney, claimant was examined by Dr. John A. Pazell, an orthopedic specialist, on July 6, 2011. The report from that appointment indicates that claimant attributed his low back injury to a fall at work on November 14, 2010. He reviewed claimant's medical records from Drs. Kirkpatrick, Whitehead, Gollier, Hanson and Lucas. The section of his report entitled "Past Medical History" does not mention claimant's 2005 accident. Nor does it appear that Dr. Pazell reviewed any medical reports from claimant's 2005 accident. His diagnosis was that claimant had left elbow ulnar neuritis and lumbosacral arthrosis with L5-S1 radiculopathy extending down into the right lower

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[8] *Id.*, Cl. Ex. 3.

[9] *Id.*, Resp. Ex. B.

[10] *Id.*

extremity to the foot. He opined the direct and proximate cause of claimant's impairment is his injury which occurred on November 14, 2010.[11]

Three of respondent's employees testified at the preliminary hearing. Stephen Stittsworth testified he was told by claimant of slipping on steps in a trailer and injuring his left arm. Claimant never told Mr. Stittsworth about a low back or right leg injury. At claimant's request, Mr. Stittsworth scheduled three appointments for claimant to see a physician. The first was the appointment with Dr. Kirkpatrick for claimant's left elbow. The second was to see a physician at Via Christi in January 2011 for the left elbow, but claimant failed to keep that appointment. The third appointment Mr. Stittsworth scheduled for claimant was with Dr. Gollier on February 15, 2011. Mr. Stittsworth testified that he first learned of a back injury when, after the February 15, 2011, appointment, Dr. Gollier requested authorization to conduct an MRI of claimant's low back.

Mr. Stittsworth testified claimant never complained about his driver's seat. Each driver makes a list of complaints about a truck for the mechanics. Mr. Stittsworth reviewed the lists made by claimant and none of them contained a complaint about the driver's seat. He also questioned the mechanics who worked on the truck and determined claimant made no complaints about the driver's seat. Mr. Stittsworth asked claimant if he had any complaints about the driver's seat and claimant allegedly said no. Mr. Stittsworth admits there was a minor leak in an air bag behind the driver's seat, but it was repaired. He also stated the air bag leak would have no effect on the driver's seat. Mr. Stittsworth testified that as of the date of the preliminary hearing, he was never informed of a low back injury by claimant.

Paul Bones testified that at the time claimant was hired, claimant did not tell Mr. Bones of the permanent restrictions resulting from the 2005 accident. Claimant only told Mr. Bones of suffering an injury to the left arm or hand in the November 2010 fall. Mr. Bones testified that he was not told about a low back injury by claimant prior to claimant being discharged.

Mark Washburn testified that shortly after the accident claimant called to report the accident and left arm and hand injury. Claimant sent Mr. Washburn photos of claimant's left hand. Mr. Washburn testified he was never told of a back injury by claimant. In January 2011, he received a voice mail from claimant. Claimant indicated in the voice mail that he went to a doctor in Kingsford, Michigan, because of diarrhea and was unable to deliver his load. In a follow-up conversation, claimant told Mr. Washburn the diarrhea was from drinking too much coffee. Later Mr. Washburn was told by claimant that the cause of the diarrhea may have been nerves. Mr. Washburn denies that he or Mr. Bones were faxed medical records from Dr. Whitehead. Mr. Washburn testified that claimant never complained to him about the driver's seat.

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[11] *Id.*, Cl. Ex. 5.

Mr. Washburn testified claimant was discharged by respondent on February 14, 2011, because of performance problems. He then described several incidents which led to claimant's discharge.

In both claims, the ALJ determined that claimant did not suffer a low back injury arising out of and in the course of his employment with respondent. In his Order, the ALJ stated:

> There were too many conflicting facts to find credible evidence of a work related back injury. The claimant had a prior back injury that left him permanently partially disabled. The claimant himself was not consistent whether he ever mentioned back pain to the respondent. To his physicians the claimant first mentioned only an arm injury, then later that he had temporary back pain from the November 14 injury, then that he had hurt his back from a rough riding truck, then back to saying he had hurt his back on November 14. The record failed to prove the claimant injured his back in the course and scope of employment, either from the November 14, 2011 *[sic]* accident or from repetitive job duties. The claimant's request for treatment for a low back injury is denied.[12]

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[13] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[14] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[15] The existence, nature and extent of the disability of an injured workman is a question of fact.[16] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical

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[12] ALJ Order (Sept. 27, 2011) at 2.

[13] K.S.A. 2010 Supp. 44-501(a), *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[14] K.S.A. 2010 Supp. 44-501(a).

[15] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[16] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

condition.[17] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[18]

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[19] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[20]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[21] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[22]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[23] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[24]

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[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[18] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[19] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[20] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[21] K.S.A. 2010 Supp. 44-501(a).

[22] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[23] K.S.A. 44-534a.

[24] K.S.A. 2010 Supp. 44-555c(k).

ANALYSIS

Respondent's witnesses testified that during the time claimant was employed by respondent, claimant never told them of a back injury. Claimant acknowledged he did not tell Mr. Stittsworth or Mr. Bones about a back injury. Claimant equivocated as to whether he told Mr. Washburn of a back injury. Mr. Stittsworth indicated he first learned claimant was alleging a back injury when Dr. Gollier requested authorization for an MRI after claimant's appointment on February 15, 2011.

Mr. Washburn and Mr. Stittsworth declared that claimant never complained about the driver's seat. Mr. Stittsworth testified he questioned the mechanics who worked on claimant's truck. None of the mechanics could recall claimant complaining about the driver's seat. Mr. Washburn indicated that on one occasion claimant said his diarrhea was due to consuming too much coffee, but later attributed the diarrhea to nerves.

The physicians' records placed into evidence contain varying information regarding claimant's low back. The report from claimant's initial visit with Dr. Kirkpatrick does not mention a back injury. Dr. Whitehead's report indicated claimant gave a history of back problems. However, Dr. Whitehead's report does not indicate he was informed by claimant of the fall on November 14, 2010. Claimant told Drs. Gollier, Lucas and Pazell that his back injury resulted from a fall on November 14, 2010. Only Dr. Hanson was told by claimant the back injury was the result of the fall on November 14, 2010, and malfunctioning air cushioning in the driver's seat.

The medical histories Drs. Hanson and Pazell obtained from claimant contain no information about claimant's 2005 back injury. That infers claimant did not tell them of his 2005 back injury. Nor do the reports of any other physician who saw claimant for his work-related accident mention the 2005 back injury. Mr. Bones testified he did not know about claimant's 2005 back injury until he was informed of it by respondent's counsel. The 2005 back injury was a significant injury that resulted in permanent restrictions and a workers compensation settlement. One would have thought claimant would have informed the physicians he saw of this significant, relatively recent back injury.

With respect to Docket No. 1,054,550, this Board Member finds that claimant did not meet his burden of proving he suffered a back injury by accident arising out of and in the course of his employment. Claimant testified briefly that bouncing while driving and getting in and out of his rig caused injury to his back. However, claimant apparently only told Dr. Hanson that the malfunctioning driver's seat caused or contributed to his low back pain. Simply put, there was little evidence presented that claimant suffered a low back injury as a result of repetitive work activities.

Claimant's allegation in Docket No. 1,050,549 that he suffered a back injury on November 14, 2010, is a closer call. Claimant told several physicians that the back injury resulted from a work-related fall. Here, the ALJ had the opportunity to assess claimant's

testimony. Some deference must be given to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented insufficient evidence to prove that he suffered a work-related back injury.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[25] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[26] This Board Member concludes that claimant has failed to prove by a preponderance of the evidence in Docket No. 1,054,549 that he suffered a low back injury arising out of and in the course of employment with respondent on November 14, 2010.

CONCLUSION

1. The record failed to prove that in Docket No. 1,054,549, claimant's back injury arose out of and in the course of his employment with respondent as a result of a traumatic injury on November 14, 2010.

2. The record failed to prove that in Docket No. 1,054,550, claimant's back injury arose out of and in the course of his employment with respondent as a result of a series of work-related traumas.

3. The issues of whether claimant gave respondent timely notice of the accident and made a timely written claim are moot.

WHEREFORE, the undersigned Board Member affirms the September 27, 2011, preliminary hearing Order entered by ALJ Hursh.

IT IS SO ORDERED.

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[25] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[26] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

Dated this ____ day of December, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Stacey Blakeman, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge